transmission facilities shared by more than one carrier, including the BOC, between end office switches. between end office switches and tandem switches, and between tandem switches, in the BOC's network."'

F. Checklist Item 6 – Unbundled Local Switching

54. Section 271(c)(2)(B)(vi) of the I996 Act requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[172] In the ***Second BellSouth Louisiana Order,*** the Commission required BellSouth to provide unbundled local switching that included line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch.[173] The features, functions, and capabilities of the switch include the basic switching function as well as the same basic capabilities that are available to the incumbent LEC's customers.[174] Additionally, local switching includes all vertical features that the switch is capable of providing, as well as any technically feasible customized routing functions.[175]

(Continued from **previous** page)
feasible, or restrict the use of unbundled transport facilities; and (d) to the extent technically feasible, provide requesting carriers with access to digital cross-connect system functionality in the same manner that the BOC offers such capabilities to interexchange carriers that purchase transport services. *Id.* at 20719.

[171] ***Id.*** at 20719, n.650. The Commission also found that **a** BOC has the following obligations with respect to shared transport: (a) provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same transport facilities that a BOC uses for its own traffic; (b) provide shared transport transmission facilities between end office switches, between its end office and tandem switches, and between tandem switches in its network; (c) permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table that is resident in the BOC's switch: and (d) permit requesting carriers to use shared (or dedicated) transport as an unbundled element to carry originating access traffic from, and terminating traffic to, customers to whom the requesting carrier is also providing local exchange service. ***Id.*** at 20720, n.652

[172] 47 U.S.C. § 271(c)(2)(B)(vi); ***see also Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20722. **A** switch connects end user lines to other end user lines. and connects end user lines to trunks used for transporting a call to another central office or to a long-distance carrier. Switches can also provide end users with "vertical features" such as call waiting, call forwarding, and caller ID, and can direct **a** call to a specific trunk, such as to a competing carrier's operator services.

[173] ***Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20722, para. 207

[174] *Id.*

[175] ***Id.*** at 20722-23, para. 207

55. Moreover, in the *Second BellSouth Louisiana Order,* the Commission required BellSouth to permit competing carriers to purchase UNEs, including unbundled switching, in a manner that permits a competing carrier to offer, and bill for, exchange access and the termination of local traffic.[176] The Commission also stated that measuring daily customer usage for billing purposes requires essentially the same OSS functions for both Competing carriers and incumbent LECs. and that a BOC must demonstrate that it is providing equivalent access to billing information.[177] Therefore, the ability of a BOC to provide billing information necessary for a competitive LEC to bill for exchange access and termination of local traffic is an aspect of unbundled local switching."' Thus, there is an overlap between the provision of unbundled local switching and the provision of the OSS billing function.[179]

56. To comply with the requirements of unbundled local switching, a BOC must also make available *trunk* ports on a shared basis and routing tables resident in the BOC's switch, as necessary to provide access to shared transport functionality."' In addition, a BOC may not limit the ability of competitors to use unbundled local switching to provide exchange access by requiring competing carriers to purchase a dedicated trunk from an interexchange carrier's point of presence to a dedicated trunk port on the local switch.[181]

G. Checklist Item 7 – 911/E911 Access and Directory Assistance/Operator Services

57. Section 271(c)(2)(B)(vii) of the Act requires a BOC to provide "[n]ondiscriminatory access to – (I) 911 and E911 services."[182] In the *Ameritech Michigan Order.* the Commission found that "section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, *i e.,* at parity."'[183]

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[176] *Id.* at 20723, para. 208.

[177] *Id,* at 20723, para. 208 (citing *Amerirech Michigan Order,* 12 FCC Rcd at 20619, para. 140)

[178] *Id.*

[179] *Id.*

[180] *Id.* at 20723, para. 209 (citing the *Amerirech Michigan Order,* 12 FCC Rcd at 20705, para. 306).

[181] *Id.* (citing the *Ameritech Michigan Order,* 12 FCC Rcd at 20714-15, paras. 324-25).

[182] 47 U.S.C. § 271(c)(2)(B)(vii). 911 and E911 services transmit calls from end users to emergency personnel. It is critical that a BOC provide competing carriers with accurate and nondiscriminatory access to 911/E911 services so that these carriers' customers *are* able to reach emergency assistance. Customers use directory assistance and operator services to obtain customer listing information and other call completion services.

[183] *Amerirech Michigan Order,* 12 FCC Rcd at 20679, para. 256.

Specifically, the Commission found that a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers."[184] For facilities-based carriers, the BOC must provide "unbundled access to [its] 911 database and 911 interconnection, including the provision of dedicated trunks from the requesting carrier's switching facilities to the 911 control office at parity with what [the BOC] provides to itself."[185] Section 271(c)(2)(B)(vii)(II) and section 271(c)(2)(B)(vii)(III) require a BOC to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services," respectively.[186] Section 251(b)(3) of the Act imposes on each LEC "the duty to permit all [competing providers of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[187] The Commission concluded in the *Second BellSouth Louisiana Order* that a BOC must be in compliance with the regulations implementing section 251(b)(3) to satisfy the requirements of sections 271(c)(2)(B)(vii)(II) and 271(c)(2)(B)(vii)(III).[188]

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[184] *Id.*

[185] *Id*

[186] 47 U.S.C. §§ 271(c)(2)(B)(vii)(II), (III).

[187] *Id.* § 251(b)(3). The Commission implemented section 251(b)(3) in the *Local Competition Second Report and Order*. 47 C.F.R. § 51.217; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 (1996) *(Local Competition Second Report and Order) vacated in part sub nom. People of the State of California v. FCC,* 124 F.3d 934 (8th Cir. 1997), *overruled in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *see also Implementation of the Telecommunications Act of 1996: Provision of Directory Listings Informarion under the Telecommunications Act of 1934*, Notice of Proposed Rulemaking, 14 FCC Rcd 15550 (1999) *(Directory Listings Informalion NPRM).*

[188] While both sections 251(b)(3) and 271(c)(2)(B)(vii)(II) refer to nondiscriminatory access to "directory assistance," section 251(b)(3) refers to nondiscriminatory access to "operator services," while section 271(c)(2)(B)(vii)(III) refers to nondiscriminatory access to "operator call completion services." 47 U.S.C. §§ 251(b)(3), 271(c)(2)(B)(vii)(III). The term "operator call completion services" is not defined in the Act, nor has the Commission previously defined the term. However, for section 251(b)(3) purposes, the term "operator services" was defined as meaning "any automatic or live assistance **to** a consumer to arrange for billing or completion, or both, of a telephone call." *Local Competition Second Report and Order,* 11 FCC Rcd at 19448, **para.** 110. In the same order the Commission concluded that busy line verification, emergency interrupt, and operator-assisted directory assistance are forms of "operator services," because they assist customers in arranging for the billing or completion (or both) of a telephone call. *Id.* at 19449, para. 111. **All** of these services may be needed or used to place a call. For example, if a customer tries to direct dial a telephone number and constantly receives a busy signal, the customer may contact the operator to attempt to complete the call. Since billing is a necessary (continued. ..)

In the *Locul Competition Second Report and Order,* the Commission held that the phrase '.nondiscriminatory access to directory assistance and directory listings" means that "the customers of all telecommunications service providers should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of **a** requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested."[189] The Commission concluded that nondiscriminatory access to the dialing patterns of 4-1-1 and 5-5-5-1-2-1-2 to access directory assistance were technically feasible, and would continue.[190] The Commission specifically held that the phrase "nondiscriminatory access to operator services" means that ''a telephone service customer, regardless of the identity of his or her local telephone service provider, must be able to connect to a local operator by dialing '0,' or '0 plus' the dcsircd telephone number."[191]

58. Competing carriers may provide operator services and directory assistance by reselling the BOC's services. outsourcing service provision to a third-party provider, or using their own personnel and facilities. The Commission's rules require BOCs to permit competitive LECs wishing to resell the BOC's operator services and directory assistance to request the BOC

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part of call completion, and busy line verification, emergency interrupt, and operator-assisted directory assistance can all be used when an operator completes a call, the Commission concluded in the *Second BellSouth Louisiana Order* that for checklist compliance purposes, "operator call completion services'' is a subset of or equivalent to "operator service." *Second BellSouth Louisiana Order,* 13 FCC Rcd at 20740, n.763. **As** a result, the Commission uses the nondiscriminatory standards established for operator services to determine whether nondiscriminatory access is provided.

[189] 47 C.F.R. § 51.217(c)(3); *Local Competition Second Report and Order,* 11 FCC Rcd at 19456-58, paras. 130-35. The *Local Competition Second Reporr and Order's* interpretation of section 251(b)(3) is limited "to access to each LEC's directory assistance service." ***Id.*** at 19456, para. 135. However, section 271(c)(2)(B)(vii) is not limited to the LEC's systems but requires "nondiscriminatory access to . . . directory assistance to allow the other carrier's customers to obtain telephone numbers." 47 U.S.C. § 271(c)(2)(B)(vii). Combined with the Commission's conclusion that "incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible," *Local* ***Competirion*** *First Report and Order,* 11 FCC Rcd at 15772-73, paras. 535-37, section 271(c)(2)(B)(vii)'s requirement should be understood to require the BOCs to provide nondiscriminatory access to the directory assistance service provider selected by the customer's local service provider, regardless of whether the competitor; provides such services itself; selects the BOC to provide such services; or chooses a third **party** to provide such services. ***See*** *Directory Listings Information NPRM.*

[190] *Local Competition Second Report and Order,* 11 FCC Rcd at **19464,** para. 151.

[191] *Id.* at 19464, para. 151

to brand their calls."[192] Competing carriers wishing to provide operator services or directory assistance using their own or a third party provider's facilities and personnel must be able to obtain directory listings either by obtaining directory information on a "read only" or "per dip" basis from the BOC's directory assistance database, or by creating their own directory assistance database by obtaining the subscriber listing information in the BOC's database.'"[193] Although the Commission originally concluded that BOCs must provide directory assistance and operator services on an unbundled basis pursuant to sections 251 and 252, the Commission removed directory assistance and operator services from the list of required UNEs in the *UNE Remand Order.*'"[194] Checklist item obligations that do not fall within a BOC's obligations under section 251(c)(3) are not subject to the requirements of sections 251 and 252 that rates be based on forward-looking economic costs.[195] Checklist item obligations that do not fall within a BOC's UNE obligations, however, stili must be provided in accordance with sections 201(b) and 202(a), which require that rates and conditions be just and reasonable. and not unreasonably discriminatory.[196]

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[192] 47 C.F.R. § 51.217(d); *Local Competition Second Report and Order,* 11 FCC Rcd at 19463, para. 148. For example, when customers call the operator or calls for directory assistance, they typically hear a message, such as "thank you for using XYZ Telephone Company." Competing carriers may use the BOC's brand, request the BOC to brand the call with the competitive carriers name or request that the BOC not brand the call at all. 47 C.F.R. § 51.217(d).

[193] 47 C.F.R. § 51.217(C)(3)(ii); *Local Competition Second Repori and Order,* 11 FCC Rcd at 19460-61, paras. 141-44; *Implementation of the Telecommunications Act of 1996: Telecommunicaiions Carriers' Use of Customer Proprietary Network Information and Other Customer Informalion, Implementation of the Local Competition Provisions of the Telecommunications Aci of 1996, Provision of Directory Listing Informarion Under ihe Communicaiions Aci of 1934, as amended,* Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking. 14 FCC Rcd 15550, 15630-31, paras. 152-54 (1999); *Provision of Directory Listing Information Under the Communicaiions Act of 1934, as amended,* First Report and Order, 16 FCC Rcd 2736.2743-51 (2001).

[194] *UNE Remand Order,* 15 FCC Rcd at 3891-92, paras. 441-42.

[195] *UNE Remand Order,* 15 FCC Rcd at 3905, para. 470; *see generally* 47 U.S.C. §§ 251-52; ***see*** *also* 47 U.S.C. § 252(d)(1)(A)(i) (requiring UNE rates to be "based on the cost (determined without reference to a rate-of-retum or other rate-based proceeding) of providing the ... network element").

[196] *UNE Remand Order,* 15 FCC Rcd at 3905-06, paras. 470-73; *see also* 47 U.S.C. §§ 201(b), 202(a).

H. Checklist Item **8** – White Pages Directory Listings

59. Section 271(c)(2)(B)(viii) of the 1996 Act requires a BOC to provide "[w]hite pages directory listings for customers of the other carrier's telephone exchange service."[197] Section 251(b)(3) of the 1996 Act obligates all LECs to permit competitive providers of telephone exchange service and telephone toll service to have nondiscriminatory access to directory listing.[198]

60. In the *Second BellSouth Louisiana Order*, the Commission concluded that, "consistent with the Commission's interpretation of 'directory listing' as used in section 251(b)(3), the term 'white pages' in section 271(c)(2)(B)(viii) refers to the local alphabetical directory that includes the residential and business listings of the customers of the local exchange provider."[199] The Commission further concluded, "the term 'directory listing,' as used in this section, includes, at a minimum, the subscriber's name, address, telephone number, or any combination thereof."[200] The Commission's *Second BellSouth Louisiana Order* also held that a BOC satisfies the requirements of checklist item 8 by demonstrating that it: (1) provided nondiscriminatory appearance and integration of white page directory listings to competitive LECs' customers: and (2) provided white page listings for competitors' customers with the same accuracy and reliability that it provides its own customers.'"

I. Checklist Item **9** – Numbering Administration

61. Section 271(c)(2)(B)(ix) of the 1996 Act requires a BOC to provide "nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers," until "the date by which telecommunications numbering

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[197] 47 U.S.C. § 271(c)(2)(B)(viii).

[198] *Id.* § 251(b)(3).

[199] *Second BellSouth Louisiana Order,* 13 FCC Rcd at 20748, para. 255

[200] *Id.* In the *Second BellSouth Louisiana Order,* the Commission stated that the definition of "directory listing" was synonymous with the definition of "subscriber list information." *Id.* at 20747 (citing the *Local Comperirion Second Reporr and Order,* 11 FCC Rcd at 19458-59). However, the Commission's decision in a later proceeding obviates this comparison, and supports the definition of directory listing delineated above. ***See*** *implementation of the Telecommunications Carriers' **Use** of Customer Proprietary Network Informalion and Other Customer Information*, CC Docket No. 96-115, Third Report and Order; *Implementation of the Local Comperirion Provisions of rhe Telecommunications **Act** of 1996,* CC Docket No. 96-98, Second Order on Reconsideration; *Provision of Directory Listing **Informa Lion under the** Telecommunications Act of 1934, As Amended, CC* Docket No. 99-273, FCC 99-227, Notice of Proposed Rulemaking, para. **160** (rel. Sept. 9, 1999).

[201] *Id.*

administration, guidelines, plan, or rules are established."[202] The checklist mandates compliance with "such guidelines, plan, or rules" after they have been established.[203] A BOC must demonstrate that it adheres to industry numbering administration guidelines and Commission rules.[204]

J. Checklist Item 10 – Databases and Associated Signaling

62. Section 271(c)(2)(B)(x) of the 1996 Act requires a BOC to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion."[205] In the *Second BellSouth Louisiana Order,* the Commission required BellSouth to demonstrate that it provided requesting carriers with nondiscriminatory access to: "(1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS)."[206] The Commission also required BellSouth to design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).[207] In the *Local Competition First Report and Order,* the Cornmission defined call-related databases as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of telecommunications service.[208] At that time the Commission required incumbent LECs to provide unbundled access to their call-related databases, including but not limited to: the Line Information Database (LIDB), the Toll Free Calling database, the Local Number Portability database, and Advanced Intelligent Network databases."[209] In the *UNE Remand Order,*

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[202] 47 U.S.C. § 271(c)(2)(B)(ix).

[203] *Id.*

[204] ***See*** *Second* ***Bell*** *South Louisiana Order,* 13 FCC Rcd at 20752; *see also Numbering Resource Optimization.* Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574 (2000); *Numbering Resource Optimization*, Second Report and Order, Order on Reconsideration in CC Docket No. 99-200 and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, CC Docket Nos. 96-98; 99-200 (rel. Dec. 29,2000); *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200 (rel. Dec. 28,2001).

[205] 47 U.S.C. § 271(c)(2)(B)(x)

[206] *Second BellSouth Louisiana Order,* 13 FCC Rcd at 20753, para. 267.

[207] *Id.* at 20755-56, para. 272.

[208] *Local Competition First Report and Order,* 11 FCC Rcd at 15741, n.1126; *UNE Remand Order,* **15** FCC Rcd at 3875. para. 403.

[209] *Id.* at 15741-42, para. 484

the Commission clarified that the definition of call-related databases "includes, but is not limited to, the calling name (CNAM) database, as well as the 911 and E911 databases."[210]

K. Checklist Item 11 – Number Portability

63. Section 271(c)(2)(B) of the 1996 Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.[211] Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[212] The 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[213] In order to prevent the cost of number portability from thwarting local competition, Congress enacted section 251(e)(2), which requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[214] Pursuant to these statutory provisions, the Commission requires LECs to offer interim number portability "to the extent technically feasible."[215] The Commission also requires LECs to gradually replace interim number portability with permanent number portability.[216] The Commission has established guidelines for states to follow in mandating a competitively neutral cost-recovery mechanism for interim

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[210] *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403

[211] 47 U.S.C. § 271(c)(2)(B)(xii).

[212] *Id.* at § 251(b)(2)

[213] *Id.* at § 153(30).

[214] *Id.* at § 251(e)(2); **see** *also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20757, para. 274; *In rhe Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11702-04 (1998) *(Third Number Portability Order); In the Matter of* ***Telephone*** *Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 16459, 16460, 16462-65, paras. 1, 6-9 (1999) *(Fourth Number Portability Order).*

[215] *Fourth Number Portability Order*, 15 FCC Rcd at 16465, para. 10; *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemalung, 11 FCC Rcd 8352, 8409-12, paras. 110-16 (1996) *(First Number Portability Order);* ***see*** *also* 47 U.S.C. § 251(b)(2).

[216] *See* 47 C.F.R. §§ 52.3(b)-(f); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8355, 8399-8404, paras. 3, 91; *Third Number Portability Order*, 13 FCC Rcd at 11708-12, paras. 12-16.

number portability,"[217] and created a competitively neural cost-recovery mechanism for long-term number portability."[218]

L. Checklist Item 12 – Local Dialing Parity

64. Section 271(c)(2)(B)(xii) requires a BOC to provide "[n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)."[219] Section 251(b)(3) imposes upon all LECs "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays."[220] Section 153(15) of the Act defines "dialing parity" as follows:

> [A] person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation.'"[221]

65. The rules implementing section 251(b)(3) provide that customers of competing carriers must be able to dial the same number of digits the BOC's customers dial to complete a local telephone call."[222] Moreover, customers of competing carriers must not otherwise suffer

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[217] *See* 47 C.F.R. § 52.29; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8417-24, paras. 127-40.

[218] *See* 47 C.F.R. §§ 52.32, 52.33; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *Third Number Portability Order*, 13 FCC Rcd at 11706-07, para. 8; *Fourth Number Portability Order* at 16464-65, para. 9.

[219] Based on the Commission's view that section 251(b)(3) does not limit the duty to provide dialing parity to any particular form of dialing parity (*i.e.*, international, interstate, intrastate, or local), the Commission adopted rules in August 1996 to implement broad guidelines and minimum nationwide standards for dialing parity. *Local Competition Second Report and Order*, 11 FCC Rcd at 19407; *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Further Order On Reconsideration, FCC 99-170 (rel. July 19, 1999).

[220] 47 U.S.C. § 251(b)(3).

[221] *Id.* § 153(15)

[222] 47 C.F.R §§ 51.205, 51.207.

inferior quality service, such as unreasonable dialing delays, compared to the BOC's customers."'

M. Checklist Item **13 –** Reciprocal Compensation

66. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[224] In turn, pursuant to section 252(d)(2)(A), "a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's **network** facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."'[225]

N. Checklist Item **14 – Resale**

67. Section 271(c)(2)(B)(xiv) of the Act requires a BOC to make "telecommunications services. . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[226] Section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[227] Section 252(d)(3) requires state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[228] Section 251(c)(4)(B) prohibits "unreasonable or discriminatory conditions or limitations" on service resold under section 251(c)(4)(A).[229] Consequently, the Commission concluded in the ***Local Competition First Report and Order*** that resale restrictions are presumed to be unreasonable unless the LEC proves to the state commission that the restriction is

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[223] ***See*** 47 C.F.R. § 51.207 (requiring same number of digits to be dialed); ***Local Competition Second Report and Order,*** 11 FCC Rcd at 19400, 19403.

[224] 47 U.S.C. § 271(c)(2)(B)(xiii).

[225] ***Id.*** § 252(d)(2)(A).

[226] ***Id.*** § 271(c)(2)(B)(xiv).

[227] *Id.* § 251(c)(4)(A).

[228] *Id.* § 252(d)(3).

[229] *Id.* § 251(c)(4)(B).

reasonable and nondiscriminatory.[230] If an incumbent LEC makes a service available only to a specific category of retail subscribers, however, a state commission may prohibit a carrier that obtains the service pursuant to section 251(c)(4)(A) from offering the service to a different category of subscribers."' If a state creates such a limitation, it must do so consistent with requirements established by the Federal Communications Commission.[232] In accordance with sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv), a BOC must also demonstrate that it provides nondiscriminatory access to operations support systems for the resale of its retail telecommunications services.[233] The ohligations of section 251(c)(4) apply to the retail telecommunications services offered by a BOC's advanced services affiliate."[234]

V. COMPLIANCE WITH SEPARATE AFFILIATE REQUIREMENTS – SECTION 272

68. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."[235] The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Nan-Accounting Safeguards Order*.[236] Together, these safeguards discourage and

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[230] *Local Competition Firsr Reporr and Order,* 11 FCC Rcd at 15966, para. 939; 47 C.F.R. § 51.613(b). The Eighth Circuit acknowledged the Commission's authority to promulgate such rules, and specifically upheld the sections of the Commission's rules concerning resale of promotions and discounts in *Iowa Utilities Board. Iowa Utils. Bd.* **v.** *FCC*, 120 F.3d at 818-19, *aff'd in part and remanded on oiher grounds, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). *See* also 47 C.F.R. §§ 51.613-51.617.

[231] 47 U.S.C. § 251(c)(4)(B)

[232] *Id.*

[233] ***See,*** *e g., Bell Atlantic* ***New York Order.*** 15 FCC Rcd at 4046-48, paras. 178-81 (Bell Atlantic provides nondiscriminatory access to its OSS ordering functions for resale services and therefore provides efficient competitors a meaningful opportunity to compete).

[234] *See Verizon Connecticut Order,* 16 FCC Rcd 14147, 14160-63, paras. 27-33 (2001); *Association of Communications Enterprises v. FCC,* 235 F.3d 662 (D.C. Cir. 2001).

[235] 47 U.S.C. § 271(d)(3)(B)

[236] *See Implementation of ihe Accounting Safeguards Under the Telecommunications Act of 1996,* CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order),* Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accouniing Safeguards of Sections 271 and 272 ofthe Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) *(Non-Accounting Safeguards Order),petition for review pending* ***sub*** *nom. SBC Communications* ***v.*** *FCC,* No. 97-
(continued. ...)

facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.'" In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.[238]

69. As the Commission stated in the ***Amerirech Michigan Order,*** compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."' The Commission's findings regarding section 272 compliance constitute independent grounds for denying an application.[240] Past and present behavior of the BOC applicant provides "the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272."[241]

VI. COMPLIANCE WITH THE PUBLIC INTEREST – SECTION 271(D)(3)(C)

70. In addition to determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest. convenience, and necessity.[242] Compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest. This approach reflects the Commission's many years of experience with the consumer benefits that flow from competition in telecommunications markets.

71. Nonetheless, the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent

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1 I18 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) ***(First Order on Reconsideration),*** Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) ***(Second Order on Reconsideration), aff'd sub nom. Bell Atlantic Telephone Companies v. FCC,*** 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) ***(Third Order on Reconsideration).***

[237] *Non-Accounting* ***Safeguards Order,*** 11 FCC Rcd at 21914; ***Accounring Safeguards Order,*** 11 FCC Rcd at 17550; ***Arneritech Michigan Order,*** 12 FCC Rcd at 20725.

[238] *Non-Accounting* ***Safeguards Order,*** I 1 FCC Rcd at 21914, paras. 15-16; ***Ameritech*** *Michigan* ***Order,*** 12 FCC Rcd at 20725, para. 346.

[239] ***Amerirech Michigan Order,*** 12 FCC Rcd at 20725, para. 346; *Bell* ***Atlantic New York Order,*** 15 FCC Rcd at 4153, para. 402.

[240] ***Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20785-86, para. 322; ***Bell Atlantic*** *New York Order*, 15 FCC Rcd at 4153, para. 402.

[241] ***Bell Arlanric New York Order,*** 15 FCC Rcd at 4153, para. 402

[242] 47 U.S.C. § 271(d)(3)(C).

determination.[243] Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, the Commission may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of the application at issue.[244] Another factor that could **be** relevant to the analysis is whether the Commission has sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition.

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[243] In addition, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist necessarily satisfies the public interest criterion. ***See Ameritech Michigan* Order,** 12 FCC Rcd at 20747 at para. 360-66; ***see also*** 141 Cong. Rec. S7971, S8043 (June. 8, 1995).

[244] ***See*** *Second BellSouth Louisiana* **Order,** 13 FCC Rcd at 20805-06, para. 360 (the public interest analysis may include consideration of "whether approval . . . will foster competition in all relevant telecommunications markets").

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: *Joint Applicarion by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communicarions Services Inc., for Authorization to Provide In-Region, Inrer-LATA Services in California*

In this Order, we grant Pacific Bell authority to provide in-region long distance service in California. California was one ofthe first states to actively investigate whether its local exchange markets were open to competition.[1] Today's decision represents the culmination of those efforts. I would like to congratulate the dedicated staff of the California Public Utilities Commission and Pacific Bell for their efforts in bringing this application to this Commission.

The item painstakingly evaluates a discrete set of questions left open by the California Commission and subsumed under our federal public interest standard. Consistent with our partnership with California regulators. we have gone to great lengths to give appropriate consideration to these issues. We do not conclude that these open questions are irrelevant to the federal public interest inquiry but rather, we have applied our existing approach to determine whether any of the allegations in the record could independently establish a public interest concern that would lead me to conclude that Pacific Bell should not be granted the requested authorization. In the end. the exhaustive record compiled in this docket convinces me that Pacific Bell has met all relevant requirements for long distance entry.

While this decision accords an appropriate amount of deference to the California Commission. the statute and our precedent also make clear that this Commission is not bound to reach the same outcomes as might be reached by the state commissions. Congress required this Commission to exercise its independent judgment in reviewing applications for authority to provide interLATA service and we have done so here today. I am hard put to see how we could have afforded any more deference to the California Commission without compromising the integrity of this Commission's independent review.

It is also worth emphasizing that the California Commission is currently considering a decision that will resolve all of its remaining concerns under state law. While I am mindful that this decision has not yet been approved by the California Commission. it would seem to me that any suggestion that we have undermined a critical state interest or otherwise acted against the wishes of the state is exaggerated. and creates conflict with the states where none can be reasonably found.

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[1] Those who are familiar with California's "OANAD" proceeding. begun in 1993, know all too well rhe extensive time and effort spent evaluating Pacific Bell's efforts to open its local exchange markets to competition. *See* Rulemaking on the Commission's **Own** Morion into Open Access and Networh Architecture Development of Dominant Carrier Networks (OANAD Proceeding). R 93-04-003, I. 93-04-002. Order Instituting Rulemaking and Order *Instituting Investigations*. California Commission (1993)

Of course. today's action does not mean that our evaluation of these markets is complete. The Cornmission has a responsibility not only to ensure that Pacific Bell is in compliance with section 271 today but also that it remains in compliance in the future. This Commission will work closely with the California commissions to ensure that Pacific Bell does not cease to meet any of the conditions required for long distance entry.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Application by SBC Communicaiions Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region InterLATA Services in California*

I commend Pacific Bell for the steps it has taken to open its local markets in California to competition. I also commend the California Public Utilities Commission for its ongoing and tireless efforts to make sure that the statutory market-opening requirements are met across the State.

Although I support granting this application. I write separately to address a number of concerns that have been raised in the course of this proceeding. The most troubling of these. for me, was the California Commission's determination that the application did not at present appear to meet the State's public interest standard. Such a concern, from any State Commission, is enough to give me pause. The public interest is a significant prong of our Section 271 approval process and one that does not always receive the attention it merits.

Although we are applying the federal statute. we consistently rely on State Commission findings in our Section 271 analysis, Moreover, our precedent holds that evidence that a Bell company has engaged in a pattern of discriminatory conduct or is disobeying federal and state telecommunications regulations would tend to undermine our confidence that the Bell company's local market is, or will remain. open to competition. I believe we must take the California Commission findings seriously and subject the public interest prong to heightened scrutiny in light of the State's findings. This is precisely what I have endeavored to do.

My conclusion, growing out of intensive analysis of both the application and the State's findings. is that the public interest is served by the majority's decision today. Significantly, the California Commission concluded in its public interest analysis that Pacific Bell has provided nondiscriminatory and open access to exchanges. including unbundling of exchange facilities. and that ongoing regulatory vigilance. oversight of Pacific Bell's activities, and enforcement could provide a check on Pacific Bell's ability to act anti-competitively. Given this finding, the FCC must be especially vigilant as it monitors Pacific Bell's continued compliance with its statutory obligations. And we anticipate that the California Commission will take steps to adopt the safeguards necessary to protect consumers and to prevent the possibility of harmful conduct in the market. I am pleased that the Order expressly recognizes that a State Commission retains the authority to enforce safeguards that promote a pro-competitive telecommunications market, protect consumers. and ensure service quality. To this end, I note that the California Commission in the near future may take steps to implement additional safeguards. If we take our shared responsibility under the Act seriously. I believe we can ensure that Pacific Bell does not act anti-competitively in the market. In the event that such conduct does come to pass. we and the State Commission must not hesitate to use our enforcement tools vigorously.

Another important issue in this proceeding is whether Pacific Bell has complied with a checklist requirement to ensure that telecommunications services are made available for resale. More precisely. the issue concerns whether Pacific Bell has met its obligation to make its DSL services available for resale. In the *SBC Arkansas/Missouri 271 Application.* the Commission concluded that our precedent on this issue is not adequately clear. Although I believed it would have been preferable to resolve the issue in that application, I agreed to **a** separate expeditious proceeding with a full record to clarify the situation. The Commission committed to a timely disposition with an NPRM by the end of 2001 and resolution of the issue as soon as possible in 2002. We are now a few short days away from the end of 2002 and we ***still*** have not provided the promised clarity. I am deeply troubled that we find ourselves in this position, but I cannot vote to deny an application when it is the Commission itself that has failed to provide clarity and direction.

Finally. I am concerned about the pricing decisions in this proceeding. The Order applies a benchmark analysis to compare the rates in California to those in Texas. In light of the age of the Texas rates and the decision of the Texas Commission to open **a** new rate proceeding. I question whether Texas is an appropriate benchmark. Nevertheless. the Order expressly recognizes that if Texas' rates were to be reduced so that the comparison is no longer valid. Pacific Bell may no longer be in compliance with Section 271. Our precedent holds that this would, in fact, be a subject for Commission scrutiny. Moreover, the California rates generally fall significantly below what the benchmark would allow. For example, our model predicts that loop costs are fourteen percent lower in California than in Texas, but the rate Pacific Bell charges for loops is 30 percent lower in California.

The problems raised in this proceeding highlight. once again, the pressing need for a svstematic. comprehensive and ongoing post-Section 271 review process to assure the reality of continued competition in all states where approvals have been granted. Competition is not guaranteed by some mad 100-yard dash to temporary compliance with a 14 point check list. Rather. it is sustained by the follow-on activities of incumbent and competitor companies and disciplined oversight by the state and federal regulatory bodies that are tasked with developing a competitive telecommunications environment.

I believe that Pacific Bell has worked hard to comply with Section **271** in California. Given the concerns raised by the California Commission. I hope and trust that we and the State will work closely together to monitor and assess Pacific Bell's continuing performance in California, and that approval does indeed, over the long haul. serve the public interest.

DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN

RE: Application by SBC Communicarions Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in California, Memorandum Opinion and Order (WC Docket No. 02-306).

1believe approval of this application at this point is premature. It is possible that with just a few months more time this Application would have gained my support, and I believe that SBC has made great strides in opening the local market in California. The company should be commended for its hard work. Despite these efforts, however, the record does not demonstrate that SBC has satisfied all of the requirements of section 271 in California.

In Section 271, Congress did not provide us with a balancing test, where we look to the quality of a BOC's overall effort to meet its responsibilities. Congress required, as the Commission has noted in previous Orders, that a BOC must meet *each and every checklist item* before the Commission grants permission to offer interLATA service.' Additionally, the granting of an application must be in the public interest. As explained more fully below, I do not believe that the application as filed reflects compliance with the entire checklist. I am not convinced that granting this application at this time is in the public interest. Indeed, the state of California explicitly found that all of the checklist requirements had not been met and that the application was not in the public interest.

I believe that the states play a critical role in our evaluation of checklist compliance. While the state evaluation may not be dispositive, I believe it should be accorded great weight. As the Commission has stated, "the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive factual record regarding the opening of the BOC's local markets to competition."'

In this application, the CPUC, the regulatory entity most knowledgeable about the local conditions of competition in California, determined that SBC's application failed checklist items 11 and **14.** The California Commission also found, under state law, that the grant of an application was not in the public interest. The CPUC's conclusions were based largely on failure to comply with state law and excessive fines Pacific Bell has had to pay. As explained more fully below, I am troubled by my sense that this Commission has not given appropriate weight or respect to the findings of the California Commission on these issues. As a result, I am not fully

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[1] *See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended To Provide In-Region, InterLATA Services in Michigan,* Memorandum Opinion and Order, 12 FCC Rcd 20543, 20585, ¶ 9 *(1997) (Arnerirech Michigan Order).*

[2] *Arnerirech Michigan Order* at ¶ 30

convinced that SBC has met the statutory requirements

Complete-As-Filed and Checklist Item 2

As this Commission has emphasized, under the Commission's rules, "an applicant is expected to demonstrate in its application that it complies with section 271 *as of the date of filing.*"[3] Compliance with section 271 requires SBC to prove that it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B).[4] Checklist item 2 requires that a state commission's determination of the just and reasonable rates for network elements must be nondiscriminatory, based on the cost of providing the network elements, and may include a reasonable profit.' As the majority explains, pursuant to this statutory mandate, the Commission has determined that prices for UNEs must be based on TELRIC principles of providing those elements.[6]

Based on these requirements, SBC's application as tiled does not meet its burden of demonstrating compliance with checklist item 2. This Commission determined that it would not approve the application based on the interim $1 837 DS3 rate offered by Pacific Bell when it filed its application on September 20. SBC fails to meet – and the majority does not conclude that it does meet – its burden of demonstrating that the $1837 rate is TELRIC-compliant. Indeed, this rate is more than triple the comparable rate in Texas,. In fact, the California Commission itself announced in June that it believed the rate was not cost-based. On day 45, however, Pacific Bell offered a lower rate of $573, but with significant conditions attached.

The majority's finding of compliance with checklist item 2 requires it to waive the complete-as-filed rule and accept this conditional, lower rate. The Commission can waive this rule only if "special circumstances warrant a deviation from the general rule and such deviation

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[3] *See In Applicarion by England Inc., Verizon Delaware Inc., Bell Atlantic Communicarions, Inc., (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions). Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization tu Provide InterLATA Services in New Hampshire and Delaware,* WC Docket No. 02-157, FCC 02-262, Memorandum Opinion and Order at ¶ I I *(2002) (Verizon New Hampshire/Delaware Order)* (citing Updated Filing Requirements for Bell Operating Company Applications under Section 271 ofthe Communications Act, CCB, Public Notice, DA 01-734 (Mar. 23,2001) (emphasis supplied).

[4] *See Application of Verizon New England Inc., Bell Atlantic Communications Inc. (D/B/A Verizon Long Distance), NYNEX Long Distance Company (D/B/A Verizon Enrerprise Solutions), and Verizon Global nelworks Inc. for Authorization to Provide In-Region InterLATA Services in Massachusetts,* CC Docket No. 01-9, FCC 0 I-130, Memorandum Opinion and Order, 16 F.C.C. Rcd. 8988, ¶ I I (2001) *(Verizon Massachusetts Order).*

[5] 47 U.S.C. § 252(d)(1). Checklist item 2 requires that "access or interconnection provided or generally offered by a Bell operating company to another telecommunications carrier [must] include[] . . . [n]ondiscriminatory access to network elements in accordance with the requirements ofsections 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B).

'Order at ¶ 16.

will serve the public interest."' Here, there are no such "special circumstances" warranting a deviation from the complete-as-filed rule. Moreover, I believe granting a waiver under the circumstances presented here is contrary to the public interest.

When Pacific Bell offered its lower rate on day 45, it attached conditions that I believe raise significant public policy concerns. The condition was tied to the outcome of this Commission's ***Triennial Review*** proceeding. **A** CLEC could only take the lower $573 rate if it agreed to give up certain rights under state law, if this Commission were to decide that DS3 no longer had to be offered on an unbundled basis.' The CLEC, then, is left with a "Hobson's choice": either (1) take an exorbitant DS3 rate at least three times higher than what it should be paying, or (2) take a lower rate that potentially forces it to give up rights under state and federal law. The majority has chosen to approve this application based on this agreement. I do not support this decision.

Approval of a 271 application based on such a conditional rate is unprecedented. Even more remarkable are the lengths to which the majority goes to excuse this late-filed conditional rate to justify their waiver of the complete-as-filed rule. The majority states that it was "not possible" for Pacific Bell to file the lower conditional rate prior to filing its application: and that the California Commission "dictated the timing" of Pacific Bell's submission.[10] No matter that there is no support in the record for such conclusions. Indeed, the record reflects quite the opposite. The California Commission announced on June 12, three months prior to Pacific Bell's filing, that its $1837 DS3 rate was based on outdated cost information and would be reexamined in the ***Relook Proceeding.*** Still, Pacific Bell chose to submit its 271 application to this Commission on September 20 with the same, outdated rate. It alone made the choice of submitting only a conditional rate reduction 45 days after filing its application. Even Pacific Bell itself does not attempt to provide any excuses for waiting 45 days to make its filing. Indeed, Pacific Bell has consistently "relied" on the $1837 rate in support of its application.'' In the

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[7] *Verizon New Hampshire/Delaware* ***Order*** at ¶ 11 (citing Northeast Cellular Telephone Co. v. FCC, 897 F.2d **1164,** 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969); 47 U.S.C. § 154(j); and 47 C.F.R. § 1.3).

[8] Under the agreement, **if** the FCC were to decide that DS3 no longer had to be offered as a UNE, the CLEC would be forced to immediately give up any rights it may have under state law to purchase DS3 as a UNE. The agreement could also **be** interpreted to force a signatory to give up any rights under federal law to a grandfarhering or phase-in of the new DS3 requirement, and to require certain "conversion charges" in the event the FCC decided DS3 were no longer a UNE, even **if** the change in legal status had no impact on the physical network. ***See*** ex parte letter from Cathleen Massey, Vice President, External Affairs, XO Communications, to Secretary, Federal Communications Commission (Nov. 12,2002).

[9] Order at ¶ 28.

[10] Order at ¶ 31

[11] See ex parte Letter from James Smith, Senior Vice President, SBC to Kevin Martin, Commissioner, FCC (Dec. 9, 2002).

absence of any evidence in the record, and even any supporting argument by Pacific Bell, I fail to see why it was "not possible'' for Pacific **Bell** to (1) reduce its rate prior to filing its application, or (2) file it earlier without conditions that 1 believe raise significant public policy concerns.

The majority takes "comfort" in the fact that one company did agree to the conditional lower rate. The majority reasons that "had the terms been so unreasonable and onerous, we doubt that any party would have agreed to them."[12] I take no such comfort in this fact. Indeed, this appears to be the same company that also signed an agreement that contained an explicit condition requiring it to support SBC's federal 271 application.[13]

Finally the majority seems to emphasize that a late rate reduction, even with such conditions attached, is not of concern because the parties have had sufficient time to comment on it, the Commission has had sufficient time to evaluate it, and another party signed a new agreement on day 77 that did not contain such conditions. This agreement is not yet in effect, is itself conditional on CPUC approval, and as a result may never even go into effect. I disagree with this rationale. If you extend this logic, then virtually any late rate reduction, regardless **of** the circumstances or conditions attached, can pass the majority's low threshold. I believe the Commission must begin its analysis by determining, as it has in past applications, whether there really are special or unique circumstances that justify the waiver. If not, then adherence to the rule requires the analysis to end there.

Moreover, granting such a waiver where there are no special circumstances justifying the waiver, and particularly where there are extraordinary conditions, sends the wrong signal. The Commission has expressed in past **271** orders, including the *SWBT Kansas/Oklahoma Order* cited by the majority, a concern that "applicants might attempt to use grant of this waiver to 'game' the section 271 process with repeated last minute rate reductions."[14] This decision creates incentives for such a process. Why shouldn't a BOC first test the waters to see if non-TELRIC rates will pass muster with the majority if it knows it can come in anytime later with a rate reduction? Indeed, it seems that even a conditional rate reduction where the conditions are onerous could now be sufficient for approval by the majority. I am concerned about the public policy implications of this decision and creating unfortunate precedent.

In this order, I fear that the majority, while noting the importance of the complete-as-filed requirement, has in all practical respects abandoned it. I believe that a more straightforward

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[12] Order **at ¶ 50.**

[13] *See Decision Granting Pacific Bell Telephone Company's Renewed Motion for an Order Thar It Has Substantially Satisfied* **the** *Requirements of* he *14-Point Checklist in § 271 and* **Denying** *That* I! *Has Satisfied § 709.2 of The Public Utilities Code* **at** ¶ 221 **(Sept. 19,2002)** (*California Commission Order).*

[14] *See Joint Application hy SBC Communicarions Inc., Southwestern* **Bell** *Tel.* Co.. *Southwestern* **Bell** *Communications Services. Inc., d/b/a Southwestern Bell Long Distance for the Provision of In-Region InterLATA Services in Kansas and Oklahoma, CC* **Docket No.** 00-217, **Memorandum Opinion and Order,** 16 **FCC** Rcd **6237, at** ¶ 27 **(2001)** (*SWBT Kansas/Oklahoma Order).*

application of the rule would result in a rejection of this application. In two recent statements, I have expressed my fear that the Commission is moving in the wrong direction in its application of the complete-as-filed requirement.[15] The majority's decision confirms that my concern was justified. In this application, I believe the majority has moved too far.

Findings of the California PUC

Under section 271(d)(2)(B), the Commission "shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)." In requiring the Commission to consult with the states, Congress afforded the states an opportunity to present their views regarding the opening of the BOCs' local networks to competition. In order to fulfill this role as effectively as possible, state commissions are required to conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition in advance of the filing of section 271 applications. **As** the Commission has emphasized in previous orders, "the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition. The state commission's development of such a record in advance of a BOC's application is all the more important in light of the strict, 90-day deadline for Commission review of section 271 applications."[16]

Here, after an intensive proceeding spanning more than four years, the California Commission found that Pacific Bell failed checklist items 11 and 14, and also failed the state's own public interest test. I am troubled by what appears to me to be insufficient weight and consideration accorded by the majority to the opinion of the CPUC, and also by an analysis that could narrow the scope of the Commission's future consideration of a state's conclusions.

Checklist Item 14

The CPUC determined that Pacific Bell failed checklist item 14 for two reasons:

> (1) failure to comply with its resale obligation with respect to advanced services pursuant to § 251(c)(4)(A), and

[15] See separate statements of Commissioner Martin in *Applicarion of Verizon Virginia. Inc., et.al., for Authorization Io Provide In-Region. InterLATA Services in Virginia,* **WC Docket** No. **02-214,** FCC **02-297,** Memorandum Opinion and Order (2002) (*Verizon Virginia Order)* and *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enrerprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc.,/or Authorization to Provide* ***In-Region*** *InterLATA Services in Rhode Island,* Memorandum Opinion and Order, 17 **FCC** Rcd 3300 (2002) *(Verizon Rhode Island Order).*

[16] ***Amerirech*** *Michigan Order* **ai** ¶ 30.

(2) including restrictive conditions in certain interconnection agreements in contravention of §251(c)(4)(B).[17]

With respect to the first reason for checklist failure, the majority considered the opinion of the CPUC and provided a detailed analysis explaining that under this Commission's own precedent, the CPUC's checklist failure on this ground does not warrant a finding of noncompliance by this Commission." I am supportive of this type of careful consideration of the state commission's opinion.

By contrast, the majority affords no such careful consideration to the determination of the CPUC that Pacific Bell also failed checklist item 14 because there were restrictive conditions in Pacific Bell's interconnection agreements. In a three-sentence analysis, the majority dismisses the CPUC's conclusion by stating (1) that the CPUC "does not provide details or explain *exactly* how these 'restrictive conditions' violate section 251(c)(4)(B)," that (2) no commenter "identify any particular 'restrictive conditions' or explain why they violate the Act, and that therefore "in the absence of factual support in our record, we do not agree with the California Commission's conclusion on this issue."[19] However, the CPUC opinion does, in fact, offer insight into the nature of these restrictive conditions. The opinion reflects that the state had before it arguments by several parties. including AT&T, XO, ASCENT, and ORA, that various interconnection agreements contained numerous restrictive conditions.'" One such condition referenced in the CPUC order was apparently contained in a particular agreement requiring the CLEC signatory to agree to support SBC's federal 271 application.[21]

The majority refuses to connect any of the information before the CPUC to the CPUC's final conclusion. Instead, the majority completely ignores the portion of the CPUC order listing these allegations, states that the CPUC has not explained the basis for its finding of noncompliance, and finally concludes that consequently, the default must be a "pass." I do not support such a cursory analysis or conclusion that default is a pass. Rather, I continue to believe it is the applicant who bears the burden.

I believe the CPUC's conclusion that certain interconnection agreements contained restrictive provisions was based upon careful consideration of the information before it and deserves a serious analysis by this Commission. At the very least, the majority could have assumed that the CPUC's conclusion was related to the interconnection agreement provisions

[17] *California Commission* ***Order*** at ¶ 227

'*Orderat ¶ 111-114

[19] Order at ¶ 115.

[20] ***California*** *Commission* ***Order*** at ¶ 218-221

[21] *California Commission* ***Order*** at ¶ 221 (referencing DSLNet agreement)

referenced in the CPUC order.[22] This would not be unduly speculative given that these were the only "restrictive" provisions referenced in the checklist 14 section of the CPUC order. The majority could have independently evaluated whether any of these provisions would have amounted to a checklist violation under federal standards. Instead, the majority's opinion seems to suggest that the CPUC's determination was pulled out of thin air.

I personally find very troubling the allegation that one of the interconnection agreements in Pacific Bell's state compliance filing required the CLEC signatory to agree to support SBC's federal 271 application.[23] Even more troubling is the majority's refusal to consider any of this information. I believe that the CPUC's determination of checklist noncompliance is sufficient to warrant, at the very least, a more thorough consideration and analysis of this issue. As a result, I am not convinced that Pacific Bell has met its burden to demonstrate compliance with checklist item 14.

The approach taken by the majority with respect to checklist item 14 is particularly strange when compared to the majority's analysis of checklist item 11. Here, the CPUC also found checklist noncompliance. The majority characterizes the primary reason for this checklist failure as the lack of a mechanized NPAC check.[24] My belief is that the mechanized check was required by the CPUC to fix a problem of service outages, and that this was the primary reason for the failure. Indeed, in its Order and as recognized by the majority, the CPUC expressed concern about Pacific Bell's ability to capture service outages for LNP orders cancelled or rescheduled at the last minute.[25] In its Findings of Fact, the CPUC also found that "the CLECs do not have certain knowledge of when Pacific will disconnect certain customers, and cannot maintain the integrity of these end-users' dial tones."[26]

Regardless of the primary reason for the checklist failure, at least in this instance when the majority disagreed with the conclusions of the CPUC on this issue, they based this on an independent analysis of performance measures related to local number portability and service outages. While I do not agree with the majority's ultimate conclusions on this issue, at least with respect to this checklist item, the majority seemed to substantively consider the issue. I believe the majority should have taken the same approach with checklist item 14.

Public Interest

In addition to evaluating compliance with the competitive checklist, Congress directed

[22] *California Commission Order at ¶ 2* 18-221

[23] *California Commission Order* at ¶ 221

[24] Order at ¶ 105.

[25] *California Commission Order* at ¶ 199-200; Order at ¶ 105

[26] *California Commission Order* ar "Findings of Fact" ¶ 253.

this Commission to also evaluate whether the requested authorization would be consistent with the "public interest, convenience and necessity."" In the past the Commission has said that in making this determination, compliance with state law and good faith compliance with rules in general is important to this analysis. Specifically, the Commission has said "we would be interested in evidence that a BOC applicant has engaged in discriminatory conduct or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local marker is, or will remain, open to competition once the BOC has received interLATA authority."" We have also recognized that a state's opinion on these issues is not only relevant, but should have "substantial weight".[29]

In this case, the CPUC found that Pacific Bell's entry into the intrastate, interexchange telecommunications market would not be in the public interest. Specifically, the CPUC found that Pacific Bell failed to meet the following 3 out of the 4 the requirements under California Public Utilities Code 709.2 for entry into the markets: (1) there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber information or subscriber contacts generated by the provision of local exchange telephone service; (2) there is no improper cross-subsidization of interexchange telecommunications service; and **(3)** there is "no substantial possibility of harm" to the competitive intrastate interexchange telecommunications market."" The CPUC's conclusions were based largely on failure *to* comply with state law and excessive fines Pacific Bell has had to pay.

Since we have granted SBC's last 271 application, the FCC has fined SBC a record ***$6*** million dollars for violating competition-related merger conditions,[31] and $84,000 for 24 violations of the Commissions collocation rules.[32] In addition, SBC paid $3.6 million under a

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"47 U.S.C. § 271(d)(3)(C)

[28] ***Ameritech*** *Michigan* ***Order*** at ¶ *391*

[29] *See Application by* ***Bell Atlantic New York for Authorization Under*** *Section* ***271*** *of the* ***Communications Act to*** *Provide In-Region,* ***InterLATA Service in the*** *State of* ***New*** York, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953 at ¶ 20 (1999) (*Bell Atlantic* ***New York Order)*** ("We thus place substantial weight on the New York Commission's conclusions, as they retlect its role not only as a driving force behind these proceedings, but also as an active participant in bringing local competition ***to*** the state's markets).

[30] Order at ¶ 166

[31] *See* FCC Fines **SBC** Communications, Inc $6 Million for Violations of Commission Merger Condition, FCC News Release, Oct. 9, 2002.

[32] ***See*** FCC Imposes ***$84,000*** Fine Against SBC Communications, Inc., FCC News Release, Feb. 25, 2002.

consent decree *as* a result of inaccurate information provided in support of its last 271 application.[33]

In light of the state commission's finding that Pacific Bell is not in compliance with state law, and this Commission's recent findings of noncompliance with our regulations, I feel uncomfortable finding this application in the public interest until the CPUC has made a final determination that they believe the company has made an adequate showing that such an authorization is in the public interest.[34]

Conclusion

I believe that SBC has taken great strides in moving toward compliance in California. I feel confident that the problems I've highlighted will be resolved very soon. I believe that if the Commission had denied this application, and SBC refiled it in the next few months, the result would be an approval that respects our complete-as-filed rule, and an analysis that gives more appropriate and greater consideration to **the** findings of the CPUC.

[33] See FCC, SBC Communications, Inc. Agree to Consent Decree – SBC **to** Make $3.6 Million Payment to United Stales Treasury, FCC News Release, May 28, 2002.

[34] I note that a very recenl (December 12) **ALJ** opinion now proposes to find that Pacific Bell has satisfied the 709.2 inquiry This is not *a* final determination ofthe CPUC and is **not** yet in effect.